SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 263

CHARLIE HERNDON,

Petitioner,

vs.

THE STATE OF NORTH CAROLINA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

MALCOLM MCQUEEN,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

To the Honorable the Supreme Court of the United States:

Your petitioner, Charlie Herndon prays the court to review on writ of certiorari a decision of the Supreme Court of the State of North Carolina in the case of State of North Carolina *vs.* Charlie Herndon, rendered on the 19th day of May, 1943, which written opinion of that Court was filed on the same date.

Page references which are hereinafter made refer to the record as printed in the court below.

PART I.

Summary and Short Statement of the Matters Involved.

Charlie Herndon, petitioner, was indicted with others on the 14th day of June, 1942, charged with "unlawfully and willfully did keep, maintain and operate a place, structure

and building, for the purpose of prostitution and assignation, and did permit a building and place under her, his and their control to be used for prostitution and assignation, with knowledge and reasonable cause to know that said building and place is to be used for prostitution and assignation, against the form of the statute in such case made and provided and against the peace and dignity of the State" (R. 1, 2).

There was no contention on the part of the State that the defendant, Charlie Herndon, had anything to do with the operation of the cabins which was the subject of the indictment. The evidence tended to disclose that the property had been padlocked under orders of the Court two or three months prior to the indictment. (Cross examination, Charlie Kinlaw, R. 18).; that the persons operating the cabins at the time of the indictment were Edith Herndon and Aviry Fairfax (R. 12). There was evidence only that Charlie Herndon did operate the service station and cabins several months prior to the indictment; that since the padlocking proceeding the property was operated by Mrs. Herndon (R. 8).

The State attempted to prove ownership of the property on petitioner by introducing a mortgage bond, presented to the Clerk of the Superior Court by C. D. Herndon and Edith Herndon dated June 23, 1942, over defendant's objection, (R. 16 & 17) and also a sheriff testified that Charlie Herndon, petitioner, said he was trying to sell the place and also testified "I don't swear he owns it now" (R. 16).

At the conclusion of the evidence for the State the defendant made a motion for judgment as of non-suit which motion was denied. The defendant was convicted and sentenced to eighteen months upon the roads (R. 3). Appeal was taken to the Supreme Court of the State of North Carolina where the judgment of the trial was found to be without error.

PART II.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under the due process clause of the 14th Amendment to the Constitution of the United States to safeguard and guarantee the fundamental principles of liberty and justice to citizens of the United States. The petitioner invoked that principle in his plea, as set out in the record in his motion for judgment as of non-suit (R. 17). There was not sufficient evidence upon which to convict this petitioner and the denial of his motion amounts to depriving the petitioner of his liberty without due process of law and contravenes the privileges and guaranties as prescribed by and contemplated under and by virtue of the 14th Amendment, guaranteeing to every citizen that no state shall deprive a person of life, liberty or property without due process of law, nor shall he be denied the equal protection of the laws.

This Court has held as follows: "the due process clause of the 14th Amendment requires that action by a State through any of its agencies must be consistent with the fundamental principals of liberty and justice which lie at the base of our civil and political institutions which not infrequently are designated as "the law of the land." Where this requirement has been disregarded in a criminal trial in a State Court, this Court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee".

The enforcement of the statute upon which this prosecution is based upon the evidence adduced amounts to a denial to the petitioner of the equal protection of the laws of the land under the Federal Constitution and for legal insufficiency of the evidence. (*Chicago M. & S. T. P. R. Co.* v. *Coogan*, 271 U. S. 472, 70 L. Ed. 1041.) The petitioner contends that evidence tended to show that the property which

the petitioner was convicted for having in his possession and control was in fact in the possession of the court under padlocking proceedings; that there was adduced no sufficient evidence of ownership at the time of the indictment; that the mortgage bond herein referred to was incompetent for that the same was executed subsequent to the indictment as shown by the record and could not be held as competent and sufficient evidence against your petitioner.

Part III

Questions Presented.

1. Did the Supreme Court of North Carolina err in not holding as a matter of law that there was not sufficient evidence to be submitted to the jury as to petitioner's ownership of the property?

2. Did the Supreme Court err in holding that the testimony of D. L. White was competent and admissible and in refusing to strike the same as shown by exception No. 10 (R. 19)?

3. Treating the record as a whole, did the Supreme Court of North Carolina err in holding that the trial judge did not err in permitting the State to offer a mortgage bond which was executed subsequent to the indictment, and in refusing to permit the same witness to testify that petitioner had conveyed the same property to other parties subject to a mortgage?

Wherefore, because the decision and judgment of the Supreme Court of North Carolina, finding no error in the entire record in the petitioners' case is violative of the due process clause of the 14th Amendment to the Constitution; constitutes a denial of the petitioner's equal protection of the laws of the land and deprives petitioner of his

liberty without due process of law and legal insufficiency of evidence sufficient to sustain the conviction in this cause, the petitioner prays that the writ of certiorari be issued to the end that his cause may be reviewed and determined by the Supreme Court of the United States, and that upon such review that the judgment of the Supreme Court of North Carolina be reversed.

CHARLIE HERNDON,
Petitioner,
MALCOLM MCQUEEN,
ROBERT H. DYE,
Counsel for Petitioner.

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THE STATE OF NORTH CAROLINA.

BRIEF.

To the Honorable the Supreme Court of the United States:

I. Opinion of the Court Below.

The opinion of the Supreme Court of North Carolina is reported in 223 N. C., page 208.

II. Jurisdiction.

The jurisdiction of this court is invoked under the Fourteenth Amendment to the Constitution of the United States, providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any citizen of life, liberty, or property, without due process of law."

III. Statement of Case.

The petitioner has made in his petition, to which this brief is attached, a brief summary of the facts and will not make a re-statement here except as discussed in the brief.

IV. Argument.

1. Did the Supreme Court of North Carolina err in not holding as a matter of law that there was not sufficient evidence to be submitted to the jury as to petitioner's ownership of the property and in refusing petitioner's motion for judgment as of non-suit?

The petitioner was arrested and charged in a warrant that on or about the 14th day of June, 1942, petitioner did "unlawfully and wilfully keep, maintain and operate a place, structure or building for the purpose of prostitution and assignation and did permit a building or place under her, his, and their control to be used for such purpose." (R. 1 and 2). There was adduced at the trial of this cause absolutely no evidence to indicate that petitioner at the time of the indictment maintained or operated the building in question nor that he kept the same. In fact, the evidence tended to show to the contrary for petitioner attempted to show by a state witness that he was engaged in the construction of an apartment house at the time in question. The Court refused to allow this petitioner to show what manner of business he was engaged in at the time of the indictment or at the time the officers made the raid which was the subject of the indictment. The witness would have answered the question favorable to the defendant, but the Court refused to allow the same to be answered although the answer is in the record; to the refusal of the Court to permit this answer the petitioner excepted. (See re-cross-examination of M. L. Everett, R. 9).

To the bill of indictment, the defendant plead not guilty. (R. 2.) According to all of the authorities we are able to find, including our own Supreme Court, this plea placed the burden of establishing the guilt of the defendant upon the State of North Carolina, and that beyond a reasonable doubt. In a capital case, *State* v. *Howell,* 218 N. C. 281, the Court said:

> "His plea denied that he was guilty of any unlawful killing and challenged both the weight and credibility of the evidence offered by the state, to show beyond a reasonable doubt that the defendant had committed an unlawful killing before any verdict of homicide could be returned."

It is undoubtedly true that the weight of the authorities are to the effect that upon a motion for judgment as of nonsuit, the evidence is to be taken in the light most favorable to the state. However, this does not mean that there is any presumption that the defendant is guilty in the absence of competent evidence, because in the absence of some admission or competent evidence in a criminal case, there can be no presumption of guilt.

> "Presumption of innocence may be overcome when facts alone are not enough, by additional weight of countervailing legislative presumption." *YeeHem* v. *U. S.,* 45 S. C. T. 470, 268 U. S. 178.

> "Defendants accused of crime are presumed to be innocent until convicted." *Powell* v. *State of Alabama,* 53 S. C. T. 55, *Weems* v. *State of Alabama,* 52 S. C. T. 648, 286 U. S. 540.

> "The commission of a crime is not to be presumed." *U. S.* v. *Amedy,* 24 U. S. 392, 11 Wheat. 392.

> "To preserve the protection of the bill of rights for hard pressed defendants, every reasonable presumption against a waiver of fundamental rights is indulged." *Glasser* v. *U. S.* 62 S. C. T. 457, 315 U. S. 60.

As we have set out in the statement, there was no contention on the part of the state that the defendant had anything to do with the operation of the cabins at the time of the indictment. The state attempted to prove ownership in the petitioner by introducing into the evidence over defendant's objection a mortgage bond executed by the defendant and dated after the bill of indictment. This was presumably for the purpose of attempting to prove title in the property in question in your petitioner. It does seem to us to be elementary that such evidence of a paper writing subsequent to the bill of indictment would be incompetent and by no stretch of the imagination would tend to show that the title to the property in question was in the defendant at the time the bill of indictment was laid. (R. 16 and 17).

The foregoing is the type and kind of evidence that this defendant was convicted upon, and since this was simply a mortgage bond executed subsequent to the indictment, to-wit: June 23, 1942, no evidence could have been introduced, that is verbally, to show that this petitioner was the owner of the property at the time of this indictment. This court has held:

> "Parole evidence is not admissible to supply, contradict, enlarge or vary, the words of a written contract." *Nash* v. *Towne*, 72 U. S. 689.

The only other evidence was the evidence of an officer who testified that he had heard the defendant say that he was trying to sell the place, to which we respectfully contend that the evidence adduced in this case was in no wise competent to be submitted to the jury upon the question of ownership at the time of the indictment.

The premises were padlocked. A state's witness testified that he knew who was operating the cabin and it was not your petitioner (R. 12). If the premises were padlocked and the same were being operated, is not the Court required

to take judicial notice of its own proceeding? "Federal Supreme Court judicially knows its own records." *U. S.* v. *California Co-op.*, 49 S. C. T. 423, 279 U. S. 553.

2. Did the Supreme Court of North Carolina err in holding that the testimony of D. L. White was competent and admissible, and refusing to strike the same as shown by Exception No. 10 (R. 19)?

To this question, we can only say that the defendant made a motion to strike the same from the record as soon as the witness had testified that he knew the general character and reputation of the place in question. Of course, this evidence could not have been incompetent had the witness known the reputation. He testified on direct examination that he knew the general reputation of these cabins and that it was bad. Nothing else appearing, the evidence was incompetent. It was certainly not contradictory, but on cross-examination (R. 18 and 19) he testified that the reputation of the cabins was learned by him *since* the indictment of a co-defendant. We submit that the evidence was not objectionable until the facts were brought out on cross-examination. The Supreme Court of North Carolina has said that in order to avail this defendant of the right to strike this testimony from the record, that defendant should have objected to the direct testimony. Up to this point, we see nothing to which might have been made a legitimate objection, and we respectfully contend that the admission of such testimony has deprived the defendant of his constitutional right to a fair and impartial trial, to which he is entitled under the Constitution of the United States.

In the case of *McNabb, et als.* v. *United States of America*, 87 S. Ct. 579, we desire to quote just two or three sentences regarding criminal procedure as follows:

> "The history of liberty has largely been the history of observance of procedural safeguards. And the

effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

3. Treating the record as a whole, did the Supreme Court err in holding that the trial judge did not err in permitting the state to offer the mortgage bond which was executed subsequent to the indictment and in refusing to permit the same witness to testify that petitioner had conveyed the same property to other parties subject to a mortgage?

We have referred heretofore to this proposition and will not reiterate it here. Suffice it to say that we feel, upon the record as a whole in this case, that this petitioner has been sentenced for a long period at hard labor upon evidence which we do not feel carries with it the burden which a sovereign state must carry in depriving one of its citizens, or a citizen of the United States, of his liberty. We contend, respectfully, that this petitioner was entitled to show in the first place the type of work he was engaged in at the time of the indictment, and this especially from a state witness who knew that fact; that upon all of the evidence in this case, your petitioner should have been granted his motion for judgment as of non-suit. It is not sufficient that he had been heard to say by a witness that he was trying to sell the place, nor that he had subsequent to the indictment executed a mortgage bond, which facts are the facts upon which the opinion of the Supreme Court of North Carolina was predicated. Also the evidence of White herein referred to is evidence that certainly should not have been admitted, was prejudicial to this petitioner's constitutional rights and should have been stricken from the record.

In the case of *Buchalter* v. *People of the State of New York,* S. Ct., 1088, this court said:

"The due process clause of the Fourteenth Amendment requires that action by a state through any of its

agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land'. Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee."

Conclusion.

For the reasons set forth in the petition for writ of certiorari and in this brief, and in order that your petitioner may not be deprived of his liberty by a trial that did not contain sufficient competent evidence to guarantee to him his constitutional right of a fair and impartial trial, it is respectfully submitted that this court should exercise its jurisdiction to preserve to your petitioner his constitutional guaranty by correcting the erroneous decision of the Supreme Court of the State of North Carolina; that a writ of certiorari should be granted; and that thereafter your petitioner's case should be set down for hearing and the judgments and decisions of the North Carolina Supreme Court and of the trial court reversed.

Respectfully submitted,

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